



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MR&S/AME, An MSC Joint Venture

File: B-250313.2

Date: March 19, 1993

Carl Vacketta, Esq., and Richard Rector, Esq., Pettit & Martin, for the protester.
Michael Hatcher, Esq., Israel and Raley, for John J. McMullen & Associates, Inc., an interested party.
James Janosek, Esq., Department of the Navy, for the agency.
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Offeror's failure to submit requested best and final offer did not preclude consideration of proposal for award of cost-reimbursement contract where acceptance period specified in proposal had not expired at time of award, initial proposal as modified by technical revisions during negotiations was technically acceptable, and cost impact of technical revisions was sufficiently minimal that failure to submit a revised cost proposal reflecting revisions did not preclude a reasonable cost evaluation.

2. The procuring agency, in conducting a cost realism analysis in a negotiated procurement for a cost-reimbursement contract, reasonably used the protester's actual indirect cost rates from the prior fiscal year, instead of the protester's significantly lower proposed rates, where there was a significant discrepancy between the protester's historical indirect cost rates and its proposed rates, and the proposed indirect rates were based upon speculative projections of increased future business and unexplained reductions in overhead expenses.

DECISION

MR&S/AME, An MSC Joint Venture (of M. Rosenblatt & Son, Inc. (MR&S) and Advanced Marine Enterprises, Inc. (AME)) protests the Military Sealift Command's (MSC) award of a contract to John J. McMullen & Associates, Inc. (JJMA), under request for proposals No. N00033-92-R-3011, for design and engineering services. JJMA was awarded that portion of the requirement under RFP-3011 which was not set aside for small

business concerns. MR&S/AME challenges MSC's evaluation of technical and cost proposals.

We deny the protest.

The solicitation contemplated award of: (1) a 3-year--base plus 2 option years--indefinite quantity, indefinite delivery, cost-plus-award-fee contract, under which MSC would issue task orders for up to 80,000 hours per year of design and engineering services in support of the design, overhaul, modification, maintenance, repair and regulatory certification of MSC ships; and (2) a second 3-year contract reserved for small business concerns under which MSC would order up to 30,000 hours of design and engineering services per year. The solicitation stated that the contractor would be required to perform a wide range of tasks; only general descriptions of the possible types of tasks--e.g., fluid systems design and analysis, main propulsion system analysis, power distribution systems analysis--were furnished. The solicitation cautioned that "the contractor must offer a wide range of talent of such depth as to be responsive in a rapid and thoroughly professional manner." It specifically required offerors to demonstrate the capability to provide up to 80,000 hours (30,000 hours for the reserved portion) of services apportioned among 22 different labor categories. Offerors were required to furnish resumes of specific proposed personnel and establish that these personnel met the qualification requirements set forth in the solicitation for the relevant labor category.

Consistent with this emphasis upon the qualification of proposed personnel, the statement of evaluation criteria in the solicitation provided that the primary emphasis during evaluation would be placed on the technical factor, with secondary emphasis on cost, and that proposed personnel would be the most important evaluation criterion under the technical factor. The remaining technical evaluation criteria, in descending order of importance, were corporate experience, management, technical approach/understanding and facilities. The solicitation provided for award to be made to the responsible offeror whose conforming offer would be most advantageous to the government, price and other specified factors considered.

MSC received seven proposals for the unrestricted portion of the requirement under RFP-3011 by closing time on March 25, 1992. Based upon the results of an audit of each proposal performed by the Defense Contract Audit Agency (DCAA), and upon a narrative and numerically-scored evaluation of initial proposals, MSC included five of the proposals--including JJMA's and MR&S/AME's--in the competitive range. MSC then commenced oral and written negotiations with competitive range offerors, culminating in a request for

revised technical proposals to be submitted by closing time on July 7. All revised technical proposals were found acceptable. The agency then requested the submission of best and final offers (BAFO) by 3 p.m. on July 15. When JJMA failed to submit a BAFO, it was contacted on that same day by the contracting officer; JJMA stated that the cost proposal submitted with its initial proposal remained unchanged notwithstanding the changes made in its revised technical proposal.

In reviewing the revised proposals, MSC recalculated and adjusted upward the initial numerical scores under the personnel criterion, which had been the focus of the discussions conducted with respect to technical proposals, but did not recompute the overall technical score. As set forth below, however, had the overall technical score been adjusted to account for the recalculation of the personnel scores, MR&S/AME's technical proposal would have retained the slight numerical advantage it possessed relative to JJMA's after the evaluation of initial proposals.

	Total Available Points	JJMA	MR&S/AME
Revised Personnel Score	20	12.89	11.8
(Initial Personnel Score)		(10.21)	(9.59)
Corporate Experience	15	12	12.75
Management	15	11.33	11.6
Technical Approach	12	9.6	10.4
Facilities	8	6.93	6.93
<hr/> Total	<hr/> 70	<hr/> 52.76	<hr/> 53.48
(Total initial score)		(50.08)	(51.27)

Notwithstanding MR&S/AME's slightly higher technical score, however, MSC found JJMA's proposal to be technically superior. Under the personnel criterion, the most important of the technical criteria, MSC determined that JJMA had proposed "a highly experienced and educated technical staff," offering the government "a vast amount of depth and specialized experience in performing engineering tasks on commercial, MSC and other government type ships that far exceeds the other technical offerors." The agency specifically found that: JJMA had proposed the greatest

number of labor hours (20,700) by personnel with degrees in naval architecture and marine engineering; JJMA had proposed the greatest number of hours (7,000) by personnel with United States Coast Guard licenses; and the majority of JJMA's proposed staff possessed an "intimate working knowledge" of American Bureau of Shipping and Coast Guard regulations, "which is immensely important in performing the anticipated tasks and supporting MSC ships." (In this regard, the statement of work advised offerors that it was MSC's intention to maintain each of its ships fully certified by the Coast Guard and classed by the American Bureau of Shipping, and that all new work must meet all applicable regulatory standards.) MSC concluded that "[t]he level and depth of technical expertise offered provide the Government with a unique opportunity to maximize hours and obtain exceptional performance quality." In addition, MSC concluded that JJMA's management plan demonstrated "an exceptional ability to effectively manage the engineering tasks and promote efficiency in work assignment procedures and innovative quality assurance controls," and that JJMA had proposed superior facilities and resources, with a significant computer aided design capability.

In contrast, while MSC evaluated MR&S/AME's technical proposal as offering strengths in several areas, it found the proposal overall to be merely satisfactory, and ranked it only third of the five proposals received, primarily because of a perceived significant weakness under the personnel criterion. MSC ranked MR&S/AME's technical proposal next to last under the personnel criterion because, although MR&S/AME had proposed a number of high quality personnel, it had proposed only minimal hours for them and also had proposed a significant number of personnel who only minimally met the personnel standards set forth in the solicitation. The agency noted that the number of hours of proposed effort by MR&S/AME personnel with Coast Guard licenses was significantly less (1,900) than the proposed effort by similarly qualified JJMA personnel (7,000 hours), while the proposed effort by MR&S/AME personnel with degrees in naval architecture and marine engineering (15,400 hours) was also less than that proposed by JJMA (20,700 hours). MSC concluded that the personnel proposed by MR&S/AME for the majority of hours lacked the depth of experience required to perform high quality work in an efficient manner and that, as a result, more effort and rework, and therefore higher ultimate costs, were likely if MR&S/AME received the award.

Although MR&S/AME's proposed cost plus base fee (\$9,133,688) totaled approximately 2 percent less than JJMA's (\$9,322,984), MR&S/AME's evaluated cost plus base fee (\$9,877,054) totaled 2 percent more than JJMA's (\$9,689,428). MSC, however, did not consider the "minimal"

difference in estimated cost to be a determining factor. MSC instead found the "significant technical disparity" between JJMA's technically superior proposal, offering the best qualified personnel, and MR&S/AME's merely satisfactory proposal, with a significant weakness in personnel, to be the determining factor, and on that basis determined JJMA's proposal to be most advantageous to the government. Upon learning of the ensuing September 4 award to JJMA, MR&S/AME filed this protest with our Office.

BAFO

MR&S/AME first argues that JJMA's failure to submit a BAFO precluded any award to the firm. We disagree.

BAFOs were only requested, not required; amendment No. 0004 advised offerors that the "purpose of this amendment is to request 'Best and Final Offers.'" (Emphasis added.) This was consistent with the Federal Acquisition Regulation (FAR), which states that BAFO requests constitute an "opportunity to submit a best and final offer." (Emphasis added.) FAR § 15.611. Although amendment No. 0004 provided that "[a]ll offerors are required to acknowledge receipt of this amendment," the failure to acknowledge an amendment does not preclude award where the offeror is otherwise obligated to perform in accordance with the terms of the solicitation. Bauer of Am. Corp. & Raymond Int'l Builders, Inc.; A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 CPD ¶ 380. Amendment No. 0004 only requested BAFOs and did not vary the terms of the solicitation; therefore, JJMA's failure to acknowledge it did not affect the firm's obligation to perform and thus did not by itself render JJMA's proposal ineligible for award.

In these circumstances, there was nothing that precluded consideration of JJMA's otherwise acceptable initial proposal for award. JJMA was obligated to perform in accordance with the statement of work and its proposal at the time of award since, by letter dated June 5, JJMA had extended the acceptance period for its offer to September 30 (3-1/2 weeks after the contract award.) See generally Data Resources, Inc., B-220079, Dec. 16, 1985, 85-2 CPD ¶ 670 (proposal properly excluded from negotiations where technically unacceptable as submitted and offeror failed to submit timely response to clarification request); Potomac Sys. Resources, Inc., B-219896, Oct. 8, 1985, 85-2 CPD ¶ 393 (proposal properly rejected where, as modified by second BAFO, it failed to offer required delivery schedule and

third BAFO containing commitment to required schedule was late).¹

As noted by MR&S/AME, JJMA did not revise its cost proposal to account for the July 7 revisions to its technical proposal. Although MR&S/AME appears to believe that this casts doubt on JJMA's performance obligations, JJMA's offer by its own terms remained open until September 30, such that if accepted by the agency by that time, the offer would form the basis of a binding contract under which JJMA would be obligated to perform in accordance with the solicitation and its proposal, as modified by the July 7 revisions. In any case, while JJMA's cost proposal did not reflect the additional cost, if any, of implementing the technical changes made in JJMA's July 7 submission, there was no basis for concluding that JJMA intended to condition its offer upon the subsequent submission of a revised cost proposal; the solicitation contemplated award of a cost-reimbursement contract, not a fixed-price contract, and JJMA therefore would be entitled to recover the reasonable and otherwise allowable costs of performance.

Nor did JJMA's failure to submit a revised cost proposal preclude a proper evaluation of the probable cost of its proposal. Although JJMA briefly discussed in its July 7 submission its previous commitment to open a new office in Oakland, California to service part of the MSC requirement, the only substantive changes made were personnel changes which the agency described in its cost evaluation as "minimal". Specifically, JJMA proposed to replace 7 of the 106 individuals offered for the contract with 6 other current employees and 1 new hire. MSC calculated the probable cost of adding these new employees to the contract by using either the highest labor rate proposed by any offeror for the labor category in question or the highest JJMA labor rate for the labor category. We find no basis for concluding that this approach materially understated JJMA's overall probable cost of performance.

TECHNICAL EVALUATION

MR&S/AME contends that neither the point scores nor the "technical discriminators" cited by MSC supported the

¹MR&S/AME argues that MSC engaged in prohibited post-BAFO discussions when it contacted JJMA to inquire about the firm's failure to submit a BAFO. However, since JJMA's initial proposal as modified was already technically acceptable and JJMA was not permitted to otherwise modify or revise its proposal, no discussions occurred. See Oak Street Distribution Center, Inc., B-243197, July 2, 1991, 91-2 CPD ¶ 14.

agency's overall determination that there was a significant technical disparity between JJMA's proposal, evaluated as technically superior, and MR&S/AME's proposal, evaluated as satisfactory. According to the protester, its proposal was technically equal to JJMA's and, as a result, should have been selected for award based on its lower proposed cost.

In reviewing an agency's selection decision, we examine the underlying evaluation to ensure that it is reasonable and consistent with the stated evaluation criteria. N W Ayer Inc., B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154. Where numerical scores are used in the evaluation, such scores are merely guides to intelligent decisionmaking and are not themselves controlling. Harris Corp; PRC Inc., B-247440.5; B-247440.6, Aug. 13, 1992, 92-2 CPD ¶ 171. Further, the significance of a given point spread depends upon all the facts and circumstances of a procurement. N W Ayer, Inc., supra. Agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. JJH, Inc., B-247535.2, Sept. 17, 1992, 92-2 CPD ¶ 185.

As noted by MR&S/AME, it is unclear from the record whether the source selection authority (SSA) was advised of the revised personnel scores, pursuant to which MR&S/AME's overall technical point advantage relative to JJMA was reduced to .72 points. It is clear, however, that she was aware of the initial evaluation scores, under which MR&S/AME possessed an overall 1.19-technical-point advantage. Notwithstanding this initial overall numerical advantage, the SSA determined that JJMA had submitted the technically superior proposal, primarily because JJMA proposed more hours of effort by well-qualified personnel than did MR&S/AME.

MR&S/AME generally argues that MSC failed to fully consider the government-related experience of its proposed personnel, and recalculates the final personnel scores to reduce JJMA's evaluated 1.09-point advantage under that criterion to a .79-point advantage. However, the protester fails either to identify any specific employee whose experience was unfairly evaluated, or to directly refute MSC's essential findings in this area.² Further, the record shows that in its

²In addition, MR&S/AME's principal, specific challenge to the personnel evaluation is untimely. In its November 3, 1992, comments on the October 20 agency report, MR&S/AME

(continued...)

evaluation, MSC actually recognized that MR&S/AME had proposed high quality personnel; the agency, however, expressed concern with regard to the minimal hours that had been proposed for the personnel. As noted above, MSC found that a significant number of MR&S/AME's proposed personnel only minimally met the personnel standards in the solicitation; the agency concluded that this lack of experience would hinder the completion of quality work in an efficient manner, result in the need for more rework and ultimately lead to higher costs. MR&S/AME has not refuted this finding. Nor has it shown that MSC unreasonably concluded that, overall, the proposed JJMA personnel possessed significant experience, which offered the government "a unique opportunity to maximize hours and obtain exceptional performance quality." In these circumstances, we find that the record supports MSC's

²(...continued)

argued that MSC had improperly permitted JJMA to offer as an assistant program manager an individual with a Canadian professional certificate in marine engineering, rather than the BS degree in engineering required by the solicitation for that category. As set forth in an affidavit furnished by the president of AME, however, shortly after receiving notice of award, he was advised by an employee of AME that the JJMA employee in question, a former employee of AME, had been proposed for a program manager position, which likewise required a BS (as well as an MS, MBA or professional engineer license). AME undertook an investigation which confirmed that the JJMA individual lacked an engineering degree; according to the affidavit, "all inquiries were completed by September 22, 1992." Under our Bid Protest Regulations, protests other than those based upon apparent solicitation defects must be filed within 10 working days of when the protester knew or should have known the basis for its protest. 4 C.F.R. § 21.2(a)(2) (1992). In our view, although MR&S/AME did not learn that the JJMA employee had been proposed for an assistant program manager position, which requires a BS in engineering, until it received a copy of JJMA's proposal in the agency report, it is clear from the record that MR&S/AME knew the essential basis of its protest--that the JJMA individual had been proposed for a position requiring a BS in engineering that the individual lacked--no later than the completion of its inquiries on September 22. Accordingly, its November 3 protest of this issue, filed 6 weeks later, is untimely and will not be considered.

determination of JJMA's superiority under the personnel criterion.³

Given that the personnel criterion was the most important technical evaluation criterion, we find no basis upon which to question MSC's determination of JJMA's overall technical superiority. While MR&S/AME also challenges the evaluation under the other less important technical criteria, it has not shown that MSC failed to take into account any relative strengths the protester possessed in those areas which would have offset JJMA's superiority under the more important personnel criterion.

For example, MR&S/AME challenges MSC's consideration under the corporate experience criterion of the qualifications of its proposed personnel. Although MSC recognized that the individual joint venturers possessed "significant" experience--MR&S was an incumbent contractor furnishing support services--the agency rated MR&S/AME as only satisfactory under the corporate experience criterion because the MR&S/AME joint venture itself lacked prior corporate experience and the personnel proposed for "the significant amount of hours" lacked depth of experience.

While an agency may consider the separate qualifications of joint venture partners in evaluating the qualifications of the joint venture, Dynamic Isolation Sys., Inc., B-247047, Apr. 28, 1992, 92-1 CPD ¶ 399, there is no requirement that a corporate experience evaluation disregard a lack of experience by the joint venture itself. In any case, even if the individual corporate experience of MR&S and AME ultimately had been considered a strength under the corporate experience criterion (as it was in the initial evaluation), there is no basis for finding that the overall evaluation would have changed. JJMA's corporate experience also was rated a "definite strength," and there is no reason to believe that any improvement in MR&S/AME's evaluation in this regard would have resulted in a comparative advantage

³MR&S/AME argues that MSC failed to conduct meaningful discussions regarding the perceived weakness with respect to its proposed personnel. The record indicates, however, that MSC led the protester into the area of its proposal requiring amplification or correction, Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424, that is, its proposed personnel. In this regard, the agency advised MR&S/AME during discussions that many specific personnel lacked the requisite or desired experience or qualifications and, according to MR&S/AME's own account of negotiations, that "[m]any of [its] resumes don't show [American Bureau of Shipping/Coast Guard]/Commercial experience."

sufficient to offset JJMA's superiority under the more important personnel criterion.

In summary, we find that the record supports MSC's determination that JJMA submitted the technically superior proposal. See North Pacific Seafoods Inc., B-249133, Oct. 20, 1992, 92-2 CPD ¶ 262 (agency may reasonably determine that numerical scores do not realistically reflect the relative benefits of the proposals).

COST EVALUATION

MR&S/AME proposed a cost plus base fee of \$9,133,688. MSC, relying in part upon the DCAA audit, evaluated the probable cost plus base fee of the proposal as \$9,877,054. Approximately \$400,000 of the upward adjustment related to proposed uncompensated overtime for AME personnel. This consisted of a cost-realism adjustment increasing the proposed direct labor cost for AME employees by \$218,733, plus consequent additional overhead and general and administrative (G&A) costs. Much of the remainder of the adjustment resulted from MSC's (and DCAA's) use of AME's historical rates for indirect costs rather than its proposed rates. MR&S/AME challenges both adjustments.

Indirect Cost Rates

MR&S/AME initially proposed overhead and G&A rates for AME which were significantly lower than AME's historical rates over the prior 3 years. MSC advised MR&S/AME during negotiations that DCAA had recommended that AME's proposed indirect and G&A rates be capped because of the significant disparity relative to its historical rates. However, instead of capping AME's rates in its BAFO, MR&S/AME somewhat increased the estimated rates. In view of MR&S/AME's failure to cap the estimated rates, which remained significantly lower than AME's historical rates, MSC evaluated AME's probable overhead and G&A costs at composite rates based upon the averages of AME's actual rates for the prior 3 years.

MR&S/AME argues that the adjustments to AME's proposed indirect cost rates were improper because the agency failed to consider information on the rates furnished in MR&S/AME's BAFO. In response to the concerns regarding the rates expressed by MSC during discussions, MR&S/AME explained in its BAFO that its proposed indirect rates were based upon: (1) AME's prior efforts to reduce overhead and G&A costs, producing a generally downward trend in rates; and (2) AME's projection of future contract awards (which determines the direct labor base upon which the indirect rates are calculated).

When an agency evaluates proposals for the award of a cost-reimbursement contract, a cost realism analysis must be performed to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. CACI, Inc. - Federal, 64 Comp. Gen. 71 (1984), 84-2 CPD ¶ 542. Because the contracting agency is in the best position to make this cost realism determination, our review is limited to determining whether the agency's cost realism analysis is reasonably based and not arbitrary. Purvis Sys., Inc., 71 Comp. Gen. 203 (1992), 92-1 CPD ¶ 132; Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

We find that MSC (and DCAA) reasonably refused to accept MR&S/AME's projection of significant reductions in indirect rates in the absence of the offeror's agreement to cap the proposed rates. Notwithstanding the reduction of its proposed rates in the BAFO, AME's proposed overhead and G&A rates remained substantially below both its most recent reported overhead and G&A rates and its composite average rates for the prior 3 years. As stated above, MR&S/AME based its reduction in proposed indirect rates relative to its historic rates on its expectation of reduced costs and additional business. In our view, the agency reasonably found its explanation unconvincing.

First, although MR&S/AME explained in its BAFO that AME's prior reported downward trend in indirect rates was "the result of concentrated company-wide efforts to reduce overhead and G&A," it failed to show where future savings supporting a continuing reduction in indirect costs were to be achieved.

Second, AME's significantly lower rates were contingent upon projections of acquiring substantial future government business, in addition to retaining most of its current business with the government. AME's projection of new business was based not upon actual contract awards to the firm, nor upon actual awards to prime contractors with which it has a binding contractual relationship, nor even upon the prospect of contracts in areas where the firm historically has received sole source awards. Its projections of new business were based upon estimates of its likelihood of prevailing in competitive procurements. While AME reported that its "historical win rate" in competition has been 30 percent, all but 1 of the 13 potential new contracts listed in the BAFO in support of its proposed indirect rates were listed with a probability of award above 30 percent, including one at 35 percent, 6 at 50 percent, 2 at 75 percent, 1 at 90 percent, and 2 at 100 percent. (AME multiplied the probability of award by the expected amount of direct labor under the contemplated contract to calculate the resulting contribution to its direct labor base.)

Further, 50.8 percent of AME's projected new direct labor hours resulted from its estimate of a 90-percent likelihood of receiving a single contract, which in turn was based on its assumptions that the team of which it was a member was one of only two viable teams in existence and that the contracting agency would make multiple awards. AME did not explain how it determined what share of the overall work under the projected award its team would ultimately receive, nor how it calculated its estimated share of its team's work. (Indeed, it is not even certain from the BAFO that its figure for the size of the overall contract took into account the projected multiple awards.) Likewise, AME failed to explain how it calculated the future work it projected under its current contracts. In these circumstances, we believe MSC reasonably relied upon AME's actual prior indirect cost rates rather than the significantly reduced proposed rates which were based upon essentially speculative projections of increased future business and an undocumented future reduction in indirect expenses. Purvis Sys. Inc., supra; see Marine Design Techs., Inc., B-221897, May 29, 1986, 86-1 CPD ¶ 502.

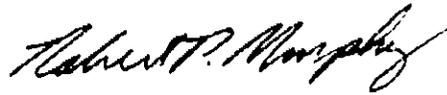
Uncompensated Overtime

MSC rejected AME's approach to calculating the amount of uncompensated overtime under the contract on the basis that no mechanism had been proposed to assure the agency that it would actually receive the benefit of the proposed uncompensated overtime during the course of the contemplated cost-reimbursement contract, with its numerous task orders. MR&S/AME argues that MSC's rejection of the approach and the consequent cost realism adjustment was unreasonable.

We need not consider this argument. Even without the adjustment on account of AME's proposed uncompensated overtime, which apparently did not total more than \$400,000, the probable cost plus base fee of MR&S/AME's proposal (approximately \$9,477,000) would have been only 2.2 percent (approximately \$212,374) lower than JJMA's (\$9,689,428). Given that the RFP placed primary evaluation emphasis on the technical factor and only "secondary emphasis" on cost; that the record shows the determining factor in the selection of JJMA was the significant technical superiority of its proposal; and that the agency considered the 2 percent cost difference to be "minimal," there is no reason to believe that this reduction in the protester's cost would have

affected the outcome. See generally RMS/NTT, a Joint Venture, B-245243.2, Sept. 8, 1992, 92-2 CPD ¶ 157. We therefore find no basis to question the award to JJMA.

The protest is denied.



for James F. Hinchman
General Counsel